

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HOWARD BERRY and DAVID BERRY,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

TRANSDEV SERVICES, INC. f/k/a VEOLIA
TRANSPORTATION SERVICES, INC.;
TRANSDEV NORTH AMERICA, INC., f/k/a
VEOLIA SERVICES, INC.; and FIRST
TRANSIT, INC.,

Defendants.

Case No.: 2:15-cv-01299-RAJ

**DEFENDANT FIRST TRANSIT,
INC.'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS TRANSDEV
SERVICES, INC.'S CROSS-CLAIM
FOR FAILURE TO STATE A CLAIM**

**NOTING DATE: NOVEMBER 18,
2016**

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I. INTRODUCTION

Transdev has asserted solely contractual claims against First Transit. However, the contracts do not provide the remedy that Transdev seeks, because Washington law establishes that: (1) Transdev is not “in privity” with First Transit under the parties’ two related but separate contracts with King County; and (2) Transdev is not an “intended” third-party beneficiary of First Transit’s contract with King County because the parties to that contract – First Transit and King County – did not manifest an intent that Transdev would have a right to directly enforce that contract against First Transit. The obligations that First Transit assumed under the contract run directly to King County, and to King County alone. The enforcement provisions of the contract clearly provide King County with the “sole discretion” to determine how any breaches will be corrected, if at all, and further give King County the unilateral right to make changes in the route scheduling. There is no language in the contract providing Transdev with any right to enforce it, and such an intent cannot be inferred because it would conflict with King County’s rights under the contract. This Court cannot rewrite the contract simply because Transdev is unhappy with the bargain it struck with King County.

Transdev’s submission of evidence outside of the pleadings does not help it because the evidence shows nothing more than what First Transit has already accepted as true for purposes of its Motion – First Transit had control over dispatching the drivers and scheduling their daily routes, including breaks. The distinction overlooked by Transdev – and that is not in any way addressed by Transdev’s evidence – is that First Transit’s contractual duties regarding scheduling are owed to King County, not to Transdev.

In the alternative, if the Court believes Transdev can state a claim against First Transit for breach of contract (which it cannot do), the contract claim that Transdev says it has is illegal and unenforceable as a matter of law. Transdev admits that it is the sole employer of the Plaintiff-drivers in this lawsuit. As their sole employer, Transdev has the responsibility to ensure that the

1 drivers receive their rest breaks and wages required by Washington law. Transdev cannot
2 lawfully shift this responsibility to a third party. Rather, a long line of cases under analogous
3 federal law, which the Washington court has followed, has held that it violates public policy for
4 an employer to delegate these compliance obligations to anyone – employee or third party – and
5 then seek indemnification from that employee or third party for allegedly failing to fulfill those
6 obligations. This is so because permitting indemnification in such circumstances would reduce
7 the employer’s incentives to act to ensure that it is complying with its obligations as an
8 employer.

9 **II. LEGAL AUTHORITY AND ARGUMENT**

10 **A. Transdev’s First Claim for Relief -- Based on its Allegation That It Was in** 11 **Privity of Contract With First Transit -- Fails To State A Claim.**

12 Transdev argues that its contract with King County, and First Transit’s separate but
13 related contract with King County, “may be construed as one contract.” Opposition (Dkt. No.
14 33), at 9. In support of its argument, Transdev cites two cases, *Turner v. Wexler*, 14 Wn. App.
15 143, 146 (1975), and *Kenney v. Read*, 100 Wn. App. 467, 474 (2000). Transdev’s argument
16 conflates the standards for contractual interpretation and privity of contract, and both cases are
17 inapposite for that reason.

18 In *Turner*, the primary case cited by Transdev, the court held that a 1965 contract
19 between two parties (the Turners and Wexlers) and a 1969 contract between those two parties
20 and a third party (the Helblings) should be “read and construed together.” 14 Wn. App. at 145.
21 There was no dispute in *Turner* over whether the parties were in privity, because all three parties
22 were expressly mutual parties to the same final contract. The court concluded the two contracts
23 should be viewed together for purposes of construing the terms of the contract, not to determine
24 whether the parties were in contractual privity. *Id.*

25 *Kenney* is irrelevant for the same reason. *Kenney* involved a dispute over a letter of
26 credit. As the court explained, a letter of credit is a “tripartite arrangement under which one

1 party establishes a credit, usually at a bank, on which it authorizes a third party to draw, provided
2 certain conditions are met.” 100 Wn. App. at 471 (citation and quotations omitted). Thus, as in
3 *Turner, Kenney* did not present any dispute over whether the parties were in privity of contract.
4 Rather, Kenney merely read two related agreements together for purposes of construing their
5 terms. *Id.* at 474.

6 Transdev completely fails to address the dispositive case cited by First Transit, *American*
7 *Pipe and Construction Company v. Harbor Construction Company*, 51 Wn.2d 258, 317 P.2d 521
8 (1958). In *American Pipe*, the Washington Supreme Court drew a distinction between the rule of
9 construction that allows related contracts to be read together for interpretation (as used in *Turner*
10 and *Kenney*), and the ability of third parties to enforce a contract. *Id.* at 263-65. The Court
11 concluded that “the rule [of construing related contracts together] is one of *interpretation* only
12 and we do not think that it can be extended to create a contract where none was intended.” *Id.* at
13 265 (emphasis in original). This case is like *American Pipe* in that two entities separately
14 contracted with a government entity, and “it is plain that no privity of contract existed” between
15 the two contractors. *Id.* at 262. Even though the contracts in the case at bar are related, it does
16 not create a contractual relationship between Transdev and First Transit. As in *American Pipe*,
17 Transdev’s only recourse is to seek to establish that it is an intended third-party beneficiary of
18 First Transit’s contract with King County, *id.* at 265, which it cannot do.

19 **B. Transdev’s Second Claim for Relief -- Based on its Allegation That It Was an**
20 **Intended Third-Party Beneficiary of First Transit’s Contract -- Fails To**
21 **State A Claim.**

22 **1. Transdev Is Not an Intended Third-Party Beneficiary of First**
23 **Transit’s Contract with King County.**

24 Transdev asserts that it “fits precisely within the definition of a third-party beneficiary to
25 the contract between First Transit and King County.” Opposition at 10. The proper question,
26 however, is not whether Transdev is a third-party beneficiary, but whether Transdev is an

1 **intended** third-party beneficiary, in the legal sense that it was intended that Transdev would have
2 a direct right of action to enforce First Transit's contract with King County.

3 Simply because a third party will clearly benefit from a contract does not provide that
4 third party with the right to enforce the contract. Rather, the third party must show there was an
5 objective intent of the contracting parties that the third party would have a direct right to enforce
6 the contract. Certainly, the contracts in the case at bar contemplated that First Transit's
7 scheduling work for King County would address the provision of breaks to drivers, as part of
8 First Transit's overall scheduling obligations. And this no doubt would benefit Transdev in
9 relation to its obligation to either provide breaks to its drivers, or pay additional wages if breaks
10 were not provided. But the fact that Transdev would benefit from First Transit's performance
11 does not answer the only relevant question, which is whether the contract shows an intent by
12 First Transit and King County that Transdev would have a **direct right of action** against First
13 Transit to enforce First Transit's contractual obligations under its contract with King County.

14 This is no different than the engineering firm that had to provide specifications and
15 supervise the work of subcontractors on a construction project in *Del Guzzi Const. Co., Inc. v.*
16 *Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 887, 719 P.2d 120 (1986).¹ In that case, the
17 defendant engineering firm's contract with the County property owner necessarily required the
18 engineering firm to provide direction and information to the subcontractors that would benefit
19 the plaintiff subcontractor. But the subcontract was held not to be an intended third party
20 beneficiary of the contract. Likewise, in *American Pipe and Construction Company v. Harbor*
21 *Construction Company*, 51 Wn.2d 258, 266-67, 317 P.2d 521 (1958), the plaintiff pipe installer
22 could not complete the work it promised to complete for the City without the pipe provided by
23 the supplier. Even though these benefits flowed from one contractor to another for their mutual
24 work on a common project, it did not create an intended third-party beneficiary relationship

25 ¹ Transdev's attempt to distinguish *Del Guzzi* on the basis that "a property owner is generally not a third-party
26 beneficiary of a contract between the general contractor and a subcontractor" must be rejected (Opposition at 12),
because it was not the property owner that claimed third-party beneficiary status in *Del Guzzi*.

1 permitting the installer to enforce the supplier's separate contract with the City. *See similarly*
2 *McDonald Construction Co. v. Murray*, 5 Wn. App. 68, 70-71, 485 P.2d 626 (1971) (tenant was
3 not intended third-party beneficiary of construction company's contract with building owner,
4 which required work to be completed so tenant could move in). Thus, even though First Transit
5 necessarily confers benefits on Transdev in performing the duties it owes to King County, that
6 does not make Transdev an intended third-party beneficiary of the contract.

7 Transdev's intended third-party beneficiary argument relies almost exclusively on
8 *Lonsdale v. Chesterfield*, 19 Wn. App. 27, 573 P.2d 822 (1978), but that case is limited to its
9 unique facts and is entirely distinguishable.² In that case a developer (Chesterfield) sold lots in a
10 residential development to prospective home owners on conditional sale contracts that included a
11 promise to install a water system. Chesterfield sold and assigned its rights under the contracts to
12 certain investors, and then sold the remaining undeveloped land to Sansaria in exchange for
13 Sansaria's agreement to install the water system for the development. Sansaria did not install the
14 water system, the lot purchasers stopped paying the investors, and the investors sued Sansaria.
15 *Id.* at 28-29. The Court ruled the investors were intended third party beneficiaries of Sansaria's
16 agreement to install the water system. *Id.* at 31. But in that case, the plaintiffs (the investors)
17 had a direct contractual claim against Chesterfield for failure to install the water system, and
18 Sansaria had, in substance, stepped into Chesterfield's place by agreeing to install the water
19 system in exchange for an asset – the remaining land – that would otherwise have been available
20 to the investors in the event of Chesterfield's default. *Id.* at 31. On those facts, the court
21 concluded that the plaintiff investors, due to their ongoing interest purchased from Chesterfield,
22 "obviously" would be "directly" benefited by the performance that Sansaria had promised to
23 Chesterfield. *Id.* Here, by contrast, Transdev does not assert a contractual claim against King
24 County (as the investors did against Chesterfield), it does not allege that First Transit has stepped

25 ² Moreover, in reviewing *Lonsdale* on appeal, the Washington Supreme Court held that the Court of Appeals did not
26 have jurisdiction to review the issue and remanded to the trial court. *Lonsdale v. Chesterfield*, 91 Wn.2d 189, 191-
92, 588 P.2d 217 (1978).

1 into King County's shoes (as Sansaria had stepped into Chesterfield's), and Transdev's claims
2 were not secured by assets that First Transit obtained in exchange for its promises to King
3 County.

4 **2. The Contract Language Does Not Give Transdev the Right to Enforce**
5 **the Contract.**

6 Contrary to Transdev's argument, the contract does not show an intent that Transdev
7 could directly enforce First Transit's contractual obligations to King County. Section 6.5(D)(12)
8 of the contract requires First Transit and Transdev to work together "to develop a plan to ensure
9 driver breaks and lunches that shall have the least impact on the provision of service." This
10 language merely manifests an intent that each of the contractors should maximize the service
11 provided to passengers, for the benefit of King County. Martell Decl. (Dkt. No. 31-2), Ex. 2 (p.
12 90). Similarly, Section 6.5(D)(1) directs First Transit to "provide non-reservation coverage from
13 5:00 p.m. to 8:00 a.m." (*i.e.*, evening staff) to perform a list of activities related to optimizing
14 service and scheduling, including scheduling breaks and lunches. *Id.* This provision at most
15 applies to the evening hours, and does not contain any requirement that breaks must be provided
16 in any particular manner. First Transit does not deny that it is responsible *to King County* for
17 scheduling, which includes scheduling breaks. These provisions, however, do not purport to
18 create a duty that runs directly from First Transit to Transdev and that Transdev may directly
19 enforce.

20 Moreover, Transdev barely addresses First Transit's argument that the claim resolution
21 procedures of the contract preclude its third-party beneficiary theory. Transdev relegates its
22 response to this aspect of *American Pipe* to a footnote, but this issue was central to the
23 Washington Supreme Court's holding in that case. In *American Pipe*, the contract could not be
24 "construed to confer upon the installation contractor the right to enforce its provisions," because
25 the contract specified the manner in which *the city* (not the third party) was empowered to
26 enforce the contract, and permitting a third party to enforce the contract would have undermined

1 the city's contractual rights. 51 Wn.2d at 266-67. The same is true here. First Transit's
2 contract with King County gives **King County**, and not Transdev, the right to enforce the
3 contract, requires First Transit and King County to engage in alternative dispute resolution, and
4 spells out a detailed procedure for First Transit and King County to give notice of alleged
5 breaches and correct defects. Martell Decl. (Dkt. No. 31-2), Ex. 2, § 1.3(B) (pp. 18-19); § 1.12
6 (p. 22); § 2.11-2.13 (p. 32-33). King County "in its sole discretion" may correct defects itself, or
7 decide "at its discretion" whether to accept any corrective actions proposed by First Transit. *Id.*,
8 § 2.12-2.13 (p. 32-33). Thus, just as in *American Pipe*, here the contract specifies the manner in
9 which the service recipient, King County, is empowered to enforce the contract, including by
10 providing King County with discretion as to whether and how any breaches will be corrected.
11 Moreover, like the city in *American Pipe*, King County retained the right to make changes to the
12 requirements in the contract, including adjusting routes and service levels. *Id.*, §§ 4.5(A)(4),
13 4.5(B)(2), and 4.5(B)(4) (p. 46); § 6.2(A)(1)-(2) (p. 78). Just as in *American Pipe*, these
14 provisions exclude any intent that Transdev would have a direct right to enforce the contract,
15 because such a right would conflict with King County's rights under the contract.

16 **3. The Extrinsic Evidence Submitted by Transdev Does Not Change the**
17 **Facts as Alleged in the Complaint, and Does Not Change the Result.**

18 The evidence extrinsic to the contracts that Transdev has submitted does not alter the
19 relevant facts or the analysis.

20 First, Transdev submits evidence purporting to show its subjective expectation that it
21 would have a direct right of action against First Transit. Opposition at 2-3, 5-6. But Transdev's
22 subjective understanding is irrelevant. The Court must look first and foremost to the terms of the
23 contract to determine the intent of the parties. *Del Guzzi*, 105 Wn.2d at 887. This is because
24 Washington follows the objective theory of contracts, which disregards any unexpressed
25 subjective understanding. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Under
26 the objective theory, "admissible extrinsic evidence does **not** include: Evidence of a party's

1 unilateral or subjective intent as to the meaning of a contract word or term . . .” *Hollis v.*
2 *Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 851 (1999) (emphasis in original). Further,
3 where, as here, there is no relevant extrinsic evidence to consider, the interpretation of a contract
4 is a question of law for the court. *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120
5 Wn.2d 573, 582, 844 P.2d 428 (1993); *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222
6 (1990).

7 Second, Transdev submits evidence that First Transit acknowledged it has responsibility
8 for dealing with the drivers’ breaks. Opposition at 14-16. This does not prove anything that is
9 not already shown by the contract itself. First Transit’s Motion accepts as true that First Transit
10 has contractual responsibility for scheduling and dispatching the routes, as shown by First
11 Transit’s contract with King County. The relevant question is not whether First Transit has a
12 contractual duty (that fact is accepted as true), but to whom the duty is owed, that is, whether an
13 alleged breach is directly actionable by Transdev. The objective language of the contract shows
14 that First Transit’s scheduling duties run solely to King County. The contract is an exchange of
15 promises between First Transit, which agreed to provide services, and King County, which
16 agreed to pay for those services. Martell Decl. (Dkt. No. 31-2), Ex. 2 (p. 3). The contract
17 language to which Transdev points is aimed at optimizing service for the benefit of King County,
18 with only incidental reference to driver breaks. Further, the enforcement provisions discussed
19 above clearly demonstrate that the parties could not have intended Transdev to enforce the
20 contract because it would interfere with King County’s right to modify First Transit’s obligations
21 and to decide whether and how to correct any breach of the contract. Moreover, King County’s
22 involvement in the correspondence submitted by Transdev with its Opposition reinforces that the
23 duty runs to King County, not Transdev. *See* Opposition at 15-16.

24 Accordingly, Transdev cannot state a claim for breach of contract against First Transit as
25 an intended third-party beneficiary.

1 **4. This Court Cannot Save Transdev From its Own Contract.**

2 Transdev complains that the contractual framework to which it agreed places Transdev
3 “at the mercy of First Transit” to schedule driver breaks. This is a plea for the Court to save
4 Transdev from the terms of its own contract, which the Court does not have authority to do. As
5 the Washington Supreme Court has explained, “it follows that the courts cannot and ought not
6 make contracts for the parties and, assuredly, cannot make a contract for them which they did not
7 make for themselves. Courts should take care under the guise of interpretation not to rewrite the
8 contract for the parties, or create a new one.” *Grant Cty. Constructors v. E. V. Lane Corp.*, 77
9 Wn.2d 110, 121, 459 P.2d 947, 954 (1969).

10 Transdev was not forced to accept these contractual terms. It could have sought revisions
11 in its bid proposal, or could have simply elected not to contract with King County. Instead,
12 Transdev chose to enter into the contract it has, which lacks any provision permitting Transdev
13 to sue First Transit. For example, there are no terms providing that “First Transit promises
14 Transdev” to do anything. Instead, all of the promises and obligations flow to and from King
15 County. Transdev’s alleged helplessness is a function of Transdev’s own contractual choices.

16 Further, and although it is not germane to ruling on First Transit’s Motion, the evidence
17 Transdev has submitted demonstrates that Transdev is not helpless. For example, Transdev’s
18 rest break policy instructs drivers about the conditions under which they must take rest breaks,
19 including the option to take intermittent breaks that are not scheduled by First Transit (which is
20 expressly permitted by Washington law), and the process to follow when they miss breaks,
21 including payment by Transdev for missed breaks. Zanduis Decl. (Dkt. No. 35), Ex. C. The
22 December 3, 2015 email from First Transit expresses that First Transit has no control when
23 drivers refuse to take breaks or ask for them to be moved. *Id.*, Ex. E. Transdev may also have
24 (unexplored) options to use the dispute resolution procedures in its contract with King County to
25 negotiate corrective actions with King County, if any are required. Transdev is not, in fact,

1 helpless, but if it is, that is a function of the contract that Transdev chose to accept and that the
2 Court cannot modify.

3 **C. Any Contract that Purported to Indemnify Transdev for Its Obligations to**
4 **Provide Rest Breaks or Wages in Lieu Thereof Would Be Illegal and**
5 **Unenforceable.**

6 Transdev admits that it is the employer of the drivers, but disclaims any obligation to
7 ensure that its drivers receive rest breaks. Instead, Transdev asserts that it “surrendered the
8 right” to control the drivers’ rest breaks. In essence, Transdev is attempting to wash its hands of
9 the responsibilities it has as an employer in Washington. This demonstrates precisely why
10 indemnification of the sort Transdev proposes is contrary to public policy, illegal, and
11 unenforceable as a matter of law.

12 As shown in First Transit’s Motion, it violates public policy, and therefore is illegal, for a
13 contract to indemnify an employer for breaching rest break or wage obligations to its employees.
14 As the court explained in *Kilgore v. Shriners Hospitals for Children*, 190 Wn. App. 429, 435,
15 360 P.3d 55 (2015), such a contract would diminish an employer’s incentives to comply with
16 wage and hour laws. Washington law places the obligation to ensure that employees receive rest
17 breaks squarely on the employer. *Pellino v. Brink’s, Inc.*, 164 Wn. App. 668, 688-90, 267 P.3d
18 383 (2011). Under *Kilgore* and the federal law upon which it is based, this responsibility cannot
19 be passed off to another through contract or agreement, whether that other is a management
20 employee of the employer or is, as here, an independent company.

21 Transdev’s only response to this argument is that *Kilgore* is distinguishable because it
22 involved an employer seeking indemnity from its employee. Opposition at 16. But in *Kilgore*,
23 the employee in question was the employer’s director of fiscal services, who had been
24 responsible for administering the employer’s payroll practices and who had created almost
25 \$400,000 in wage liability for the employer by falsifying other employees’ time cards. 190 Wn.
26 App. at 431. Despite these egregious facts, the court ruled that it was against public policy to
permit the employer to sue this manager for damages for the wage violations that the manager

1 had created. Critically, the court's reasoning was not that the manager should be afforded some
2 special protection because she had been an employee, but rather that permitting an employer to
3 bring a contractual claim for indemnity against the manager for wage violations she caused
4 would improperly diminish the employer's incentive to ensure that it was complying with its
5 own wage obligations. As the court held:

6 Thus, as with the FLSA, the [Washington Minimum Wage Act's]
7 statutory goals would be undermined by diminishing the
8 employer's compliance incentives if an employer were permitted
9 to seek indemnity from its employees for statutory violations.

10 190 Wn. App. at 435. This rule – that contractual indemnity will not be permitted where it
11 reduces an employer's compliance incentives – applies with equal force to a claim brought
12 against a non-employee third party. The courts have applied this rule to deny contractual
13 indemnity claims against independent entities, and there is no doctrinal basis to distinguish the
14 two situations. *See, e.g., Local 1035, Int'l Brotherhood of Teamsters v. Pepsi Allied Bottlers,*
15 *Inc.*, 99 F. Supp.2d 219, 221-22 (D. Conn. 2000); *Gustafson v. Bell Atlantic Corp.*, 171 F.
16 Supp.2d 311, 327-28 (S.D.N.Y. 2001).

17 For these reasons, the contractual rights that Transdev claims (which do not exist) would
18 be illegal and unenforceable in any event. Even in a direct contract between Transdev and First
19 Transit, Transdev could not indemnify itself and sidestep its obligation to provide its employees
20 with rest breaks or wages in lieu thereof.³

21 **III. CONCLUSION**

22 In sum, First Transit's contractual obligations with regard to scheduling and dispatching
23 the drivers run directly to King County, and Transdev does not have a direct right to enforce that
24 contract against First Transit. Alternatively, if Transdev is correct that the contract grants

25 ³ At points in its argument, Transdev appears to argue that First Transit was the entity that bore primary legal
26 responsible for providing rest breaks to Transdev's drivers. This is not true. Under Washington law, it is the
27 employer that has the obligation to ensure that employees receive rest breaks. (Dkt. No. 30, at 9-10). Transdev
28 acknowledges that it is the sole employer of the drivers. Opposition at 1. First Transit's control over scheduling
29 does not make it an employer of the drivers. (Dkt. No. 26, at 16-17).

1 Transdev a contractual right of action against First Transit for any alleged failure to provide rest
2 breaks, that is a contract that purports to absolve Transdev of its obligations, as an employer, to
3 provide its employees with rest break or wages in lieu thereof, and any such contract is illegal
4 and unenforceable. In either case, First Transit's Motion to Dismiss Transdev's Cross-Claim
5 should be granted.
6

7 November 18, 2016
8

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CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. On November 18, 2016, I

x	ELECTRONICALLY FILED the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:
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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on November 18, 2016, at Seattle, Washington.

s/ Sally Swearinger

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**FIRST TRANSIT, INC.'S REPLY ISO MOTION
TO DISMISS TRANSDDEV'S CROSS-CLAIM
Case No. 2:15-cv-01299-RAJ**